U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 December 2002

CASE NOS. 2002-BLA-50
2002-BLA-51

In the Matter of

MARLENE W. LAMBERT, Survivor of and on behalf of RUSSELL J. LAMBERT,
Claimant

v.

CONESVILLE COAL PREPARATION COMPANY;
SOLAR FUEL COMPANY (a/k/a SOLAR SERVICE COMPANY),
Employers

and

OLD REPUBLIC INSURANCE COMPANY, INC.,
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

APPEARANCES:

Russell E. Lambert, Lay Representative
For the Claimant

David L. Yaussy, Esquire
For Conesville Coal Preparation Company

George H. Thompson, Esquire
For Solar Fuel Company & Carrier

Before: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER-DENYING BENEFITS

This proceeding arises from claims for benefits filed by Russell J. Lambert, a now deceased coal miner, and Marlene W. Lambert, his surviving spouse, under the Black Lung Benefits Act, 30 U.S.C. §901, *et seq.* Regulations implementing the Act have been published by the Secretary of Labor in Title 20 of the Code of Federal Regulations.[1]

Black lung benefits are awarded to coal miners who are totally disabled by pneumoconiosis caused by inhalation of harmful dust in the course of coal mine employment and to the surviving dependents of coal miners whose death was caused by pneumoconiosis. Coal workers' pneumoconiosis is commonly known as black lung disease.

A formal hearing was held before the undersigned on May 14, 2002 in Pittsburgh, Pennsylvania. The parties were afforded full opportunity to present evidence and argument as provided in the Act and the regulations issued. Pursuant to leave granted at the formal hearing (TR 44-45) as modified in my Order Granting Extension of Time, dated June 21, 2002, the record was held open until July 30, 2002 for the submission of post-hearing briefs.

The record consists of the hearing transcript, Director's Exhibits 1 through 124 (DX 1-124), Claimant's Exhibits A through H (CX A-H), Solar Fuel Company's Exhibits 1, 2, and 4 (Solar EX 1, 2, 4), and Conesville Coal Preparation Exhibits 1 through 3 (Conesville EX 1-3). In addition, the closing arguments of the respective parties have been considered.

The findings of fact and conclusions of law which follow are based upon my analysis of the entire record, including all documentary evidence admitted, arguments made, and the testimony presented. Where pertinent, I have made credibility determinations concerning the

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[1] The Secretary of Labor adopted amendments to the "Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969" as set forth in Federal Register/Vol. 65, No. 245 Wednesday, December 20, 2000. The revised Part 718 regulations became effective on January 19, 2001 and were to apply to both pending and newly filed cases. The new Part 725 regulations also became effective on January 19, 2001. Some of the new procedural aspects of the Part 725 regulations, however, were to apply only to claims filed on or after January 19, 2001, *not* to pending cases. The Amendments to the Part 718 and 725 regulations were challenged in a lawsuit filed in the United States District Court for the District of Columbia in *National Mining Association v. Chao*, No. 1:00CV03086 (EGS). On February 9, 2001, the District Court issued a Preliminary Injunction Order which enjoined the application of the Amendments except where the adjudicator, after briefing by the parties to the pending claim, determines that the regulations at issue in the instant lawsuit will not affect the outcome of the case. At the formal hearing held on August 8, 2001, the parties agreed to proceed with the hearing, while reserving the right to challenge the application of the new regulations if they felt prejudiced thereby (TR 16-17). On August 9, 2001, the United States District Court for the District of Columbia issued a decision granting the U.S. Department of Labor's motion for summary judgment in *National Mining Association v. Chao*, dissolved the Preliminary Injunction, and upheld the validity of the amended regulations. On appeal, the D.C. Circuit issued its decision in *National Mining Ass'n, et al v. Dep't of Labor*, ___ F.3d_____(D.C. Cir. June 14, 2002), which further addressed the validity and application of the revised regulations. With the exception of a few provisions, the Court affirmed the validity of the revised regulations, as well as its retroactive application. However, as stated in revised 20 C.F.R. §725.2, the provisions of §725.309 (*i.e.*, duplicate or additional claims) are not applicable to claims pending on January 19, 2001. Furthermore, the provisions of revised 20 C.F.R. §718.205(c)(5) regarding pneumoconiosis hastening the miner's death simply codifies existing case law. Accordingly, I find that under the particular facts herein, the Amendments do not affect the outcome of this claim.

evidence.

Procedural History

On or about November 23, 1983, Russell J. Lambert, a former coal miner, filed an application for black lung benefits under the Act, which was denied by the District Director's office in correspondence, dated April 9, 1984. (DX 47). The miner did not appeal or take any further action regarding the foregoing claim. Accordingly, the 1983 miner's claim has been finally denied and administratively closed. (DX 124).

On October 12, 1995, Mr. Lambert filed the current miner's claim for benefits under the Act (DX 1), which was denied by the District Director's office on February 21, 1996 (DX 21) and September 25, 1996 (DX 41), respectively. Following a formal hearing before Administrative Law Judge George P. Morin on December 5, 1997, which primarily focused on the responsible operator issue (DX 66), Judge Morin issued an Order Dismissing Named Operator, dated June 29, 1998, in which Conesville Coal Preparation Company (hereinafter "Conesville") was dismissed as responsible operator; and, the remaining parties were accorded time to develop additional medical evidence. (DX 76). Pursuant to a Motion for Reconsideration filed by Solar Fuel Company (hereinafter "Solar"), and responses thereto by Conesville and the Director, OWCP (hereinafter "Director"), respectively, Judge Morin issued a Decision on Motion for Reconsideration, dated August 26, 1998, denying Solar's motion for reconsideration; dismissing Conesville; naming Solar as the designated responsible operator; denying Solar's motion to hold the development of medical evidence in abeyance; and, directing the parties to submit additional medical evidence by October 15, 1998. (DX 84). Following Director's appeal and Solar's cross-appeal, as well as Solar's Motion for Extension of Time to Develop Evidence, Judge Morin issued an Order Granting Solar Fuel Company's Motion to Hold Record in Abeyance, dated November 2, 1998. (DX 89). Subsequently, on May 31, 2000, the Benefits Review Board (hereinafter the "Board") issued a Decision and Order, dated May 31, 2000, in which the Board vacated the dismissal of Conesville as a party, and remanded this case "for the administrative law judge to reinstate Conesville as a party to this action and to adjudicate the merits of this claim." (DX 106).

During the pendency of the appeal, Mr. Lambert passed away on June 24, 1999. (DX 103). On November 20, 2000, his surviving spouse, Marlene W. Lambert (hereinafter "Claimant" or "widow") filed an application for survivor's benefits. (DX 121-1). Pursuant to Claimant's request, Judge Robert J. Lesnick issued an Order of Remand, dated November 24, 2000, whereby the miner's claim was remanded to the District Director's office "to be associated with the claim filed by the survivor of Russell Lambert." (DX 114).

Following the Order of Remand (DX 114), the District Director issued multiple proposed findings regarding the miner's and survivor's claims, as follows:

1. On March 2, 2001, the District Director issued an "Order to Show Cause Why Modification Can Not Be Granted" whereby he made a proposed finding that a

change in condition had been established since the September 25, 1996 denial (DX 41); that the miner has established that his disability is due to coal worker's pneumoconiosis; and, the parties were provided thirty days to show cause why a modification should not be granted (DX 115).[2]

2. On June 29, 2001, the District Director issued a "Proposed Decision and Order Granting Request for Modification," in which he concluded: "the District Director has determined that the medical evidence is sufficient to award claim entitlement payable for June 1999, month of death only. (DX 117).

3. On August 9, 2001, the District Director issued correspondence, dated August 9, 2001, denying the survivor's claim based upon his finding that the evidence "does not show the disease [pneumoconiosis] caused the miner's death." (DX 121-24).

The Employers controverted and requested a formal hearing regarding the District Director's proposed award of benefits in the miner's claim. (DX 118,119). The Claimant requested a formal hearing regarding the District Director's denial of the survivor's claim. (DX 121-27). I was assigned the case on January 31, 2002.

Issues

Although Solar is willing to stipulate to 28 years of coal mine employment, this is based upon its position that Mr. Lambert's work with Solar and Conesville constituted coal mine employment. On the other hand, Conesville contends that Mr. Lambert's work with Conesville was not coal mine employment within the meaning of the Act. (TR 14). Accordingly, the length of coal mine employment is contingent upon the responsible operator issue. As stated above, the responsible operator issue was previously addressed in Judge Morin's Order Dismissing Named Operator (DX 76) and Decision on Motion for Reconsideration (DX 84), and partially vacated in the Board's Decision and Order, dated May 31, 2000. (DX 106). Although the Board reinstated Conesville as a party pending a determination on the merits, it did not expressly vacate Judge Morin's underlying rationale for dismissing Conesville. Furthermore, the Board did not direct the administrative law judge to re-visit the issue, but rather to adjudicate the merits of the claim. (DX 106). Moreover, the Employers agreed that the focus of my decision should be on the merits, and that if benefits are awarded, the responsible operator issue will be litigated at the appellate level (*i.e.*, by the Board). (TR 12). Accordingly, I find that the responsible operator issue (and the underlying length of coal mine employment issue) are preserved for appeal; however, the primary focus herein is on the merits (*i.e.*, the medical issues).

[2] The District Director erroneously cited the modification provisions set forth in §725.310. As outlined above, the Claiamnt appealed the September 25, 1996 denial, a formal hearing was held before an adminstrative law judge, the case went before the Board on the responsible operator issue, and the merits of the miner's case were never finally adjudicated. On the other hand, the provisions of §725.309 are applicable, since the 1983 claim was finally denied on April 9, 1984. (DX 47).

At the formal hearing, Solar contested the pneumoconiosis issue, while Conesville stipulated to the presence of pneumoconiosis. (TR 10-11). However, in its post-hearing, written argument, even Solar agreed "to the presence of a very mild degree of simple coalworkers' pneumoconiosis for the miner." (Solar's Closing Argument, p. 3). Accordingly, "pneumoconiosis" is no longer a contested issue. Furthermore, even if Mr. Lambert's work for Conesville did not constitute coal mine employment within the meaning of the Act, as found by Judge Morin, the Claimant has still established approximately 17 or 18 years of coal mine employment, as an employee for Solar (DX 4; *Compare* DX 2).[3]

Accordingly, the primary contested issues in the miner's and widow's claim, respectively, are as follows:

Miner's Claim:

1. Whether the miner was totally disabled (by a respiratory or pulmonary impairment).
2. Whether the miner's disability was due to pneumoconiosis.

Widow's Claim:

1. Whether the miner's death was due to pneumoconiosis.

(Solar's Closing Argument, p. 3; Conesville's Closing Argument, pp. 3-13; *See also*, Claimant's Closing Argument).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Except as otherwise vacated by the Benefits Review Board, or superseded herein, the evidence which was previously analyzed by the Judge Morin is incorporated by reference herein. Accordingly, the focus herein is on the merits of the claims, *not* the responsible operator issue.[4]

Personal Background and History

The former miner, Russell J. Lambert, was born on May 19, 1933. He married Marlene W. Lambert (nee Weimer) on August 18, 1953. They remained married until his death on June 24, 1999. The former miner had one dependent for purposes of possible augmentation of benefits

[3] Mr. Lambert testified before Judge Morin that the duties he performed for Solar, as a stationary equipment operator, were essentially the same as those he subsequently performed for Conesville. (DX 66, pp. 12-16,40). Furthermore, Mr. Lambert specified that the coal at Solar was raw, uncleaned, and unprocessed. After it was processed, the coal was transported to power plants and/or sent to Baltimore to be loaded on barges for shipment to Japan. (DX 66, pp. 39-42). On the other hand, the coal processed at Conesville was all used at Conesville's power plant. (DX 66, pp. 42-43).

[4] In view of my determination on the merits, the responsible operator issue is moot.

under the Act; namely, his spouse, Marlene W. Lambert. However, she has no dependents. (DX 1,12,103,121-1; TR 20).

At the formal hearing before Judge Morin on December 5, 1997, Mr. Lambert testified that he had been suffering from breathing problems for 10 to 15 years, and that he had been taking Combivent, which was prescribed by Dr. Desai, for approximately 8 years. In addition, Mr. Lambert testified that had been diagnosed with prostate cancer about one year prior to the hearing, and, he was being treated with "shots...every three months." (DX 66, pp. 17-19).

Mr. Lambert also testified that he used to smoke cigarettes from about age 20 (*i.e.*, 1953) until about "15 years ago" (*i.e.*, 1982). (DX 66, pp. 19-20). On cross-examination, Mr. Lambert acknowledged a cigarette smoking history of approximately 30 years, from age 20 to 50. However, he denied smoking a pack per day, and testified that he was "never a heavy smoker." On further examination, Mr. Lambert denied smoking three-quarters of a pack per day, stating that "a lot of times two packs - - or a pack of cigarettes would last me for the third say." In addition, he testified that, during the course of his smoking history, he "quit a couple of times...probably around six months. I don't know." (DX 66, pp. 30-31). Furthermore, Mr. Lambert testified that he had been told that there might be a growth or lump in his lungs, but that when he went back for another x-ray, the physician told him it was gone. (DX 66, p. 31).

Some of the medical records, however, indicate that the former miner understated his cigarette smoking history. For example, in a report, dated August 20, 1996, Dr. Fino stated that Mr. Lambert "smoked one pack per day for 35 years, from 1953 until 1988." (DX 33). In a report, dated May 28, 1997, Dr. Pickerill set forth the following detailed smoking history: "Previously smoked 2 packs of cigarettes daily for at least 32 years and claimed he quit smoking in 1988, but the medical records of Dr. Goudy indicates that Mr. Lambert was still smoking 5 cigarettes/daily on 5-12-92." (DX 53). In addition, the Allegheny General Hospital Radiation Oncology "Consultation/Reconsultation" report, dated January 5, 1999, states that Mr. Lambert had a "40+ pack year history of smoking, quit 10 years ago." (DX 121-19). Furthermore, Claimant testified that her husband smoked cigarettes from about age 20 (*i.e.*, 1953) until 1990. Moreover, she acknowledged that he actually smoked approximately one pack per day, even though he sometimes lit two packs, because he never smoked the whole cigarette. (TR 28-30). In view of the foregoing, I find that the Claimant had an extensive cigarette smoking history.

Claimant testified that her husband retired in 1995, because he was suffering from shortness of breath; and, that he had been having breathing problems for several years prior to his death. As of 1997 or 1998, he couldn't even walk across the living room, a distance of about 13 feet, because he couldn't breathe. Mr. Lambert was treated by Dr. Desai, a breathing specialist, who prescribed medications, inhalers, and, finally, oxygen. During the last few years, Mr. Lambert was repeatedly hospitalized, primarily for his lung problems. In addition, he had prostate problems. (TR 23-28).

Although Mr. Lambert had testified at the prior hearing, on December 5, 1997, that he had been told that he had a growth in his lungs which disappeared (DX 66, p. 31), the Claimant testified, at the May 14, 2002 hearing, that her husband was first diagnosed with lung cancer in December 1998 or January 1999. (TR 32). Moreover, Claimant testified that, in January 1999, Mr. Lambert was told that he only had 5 months to live. As stated above, Mr. Lambert died on June 24, 1999. (TR 32; DX 103).

Medical Evidence

The case file contains numerous chest x-ray interpretations, pulmonary function studies, arterial blood gas test results, and medical opinions. However, as outlined above, the presence of simple pneumoconiosis has been conceded by both Employers, and there is no credible evidence that the miner suffered from complicated pneumoconiosis. Accordingly, further analysis of the x-ray evidence is unnecessary. The relevant medical evidence regarding the miner's and widow's claims is summarized below.

A. Pulmonary Function Studies

Pulmonary function studies were performed by Mr. Lambert on January 23, 1984 (DX 47), December 4, 1995 (DX 13), August 8, 1996 (DX 33), May 28, 1997 (DX 53), June 24, 1997 (DX 54), and December 31, 1998. (DX 121-19).

Except for the January 23, 1984 study, all of the pulmonary function studies are qualifying under the applicable regulatory criteria set forth in 20 C.F.R. Part 718, Appendix B. The pulmonary function studies from December 4, 1995 through December 31, 1998 are qualifying based upon the FEV1 values *and* the FEV1/FVC ratio of less than 55% and/or qualifying MVV results.[5] In view of the foregoing, I find that total disability has been established based on the preponderance of the pulmonary function study evidence.

B. Arterial Blood Gas Studies

Arterial blood gas studies were administered on January 23, 1984 (DX 47), December 4, 1995 (DX 17), August 8, 1996 (DX 33), May 28, 1997 (DX 53), December 17 1997 (DX 77), March 2, 1998 (DX 77), March 4, 1998 (DX 77), March 5, 1998 (DX 77), March 6, 1998 (DX 77), March 7, 1998 (DX 77), March 8, 1998 (DX 77), March 10, 1998 (DX 77), March 13, 1998 (DX 77), and March 15, 1998. (DX 77). The blood gas tests conducted between December 17, 1997 and March 15, 1998, were administered while Mr. Lambert was being treated at Somerset Hospital.

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[5] Solar's Closing Argument, page 3, misstated the FEV1 result of the December 31, 1998 pulmonary function test; and, inaccurately states that the study is not qualifying. The actual FEV1 results on the foregoing test were: 0.76 (before bronchodilator) and 0.82 (after bronchodilator). The FEV1 value of "2.74" mentioned in Solar's Closing Argument was the *predicted* value. (DX 121-19).

Although a few of the arterial blood gas studies conducted during the miner's hospitalization, in March 1998, yielded qualifying results under the regulatory standard set forth in Part 718, Appendix C (DX 77), the clear majority of the tests are not qualifying.[6] Therefore, I find that total disability has not been established based on the preponderance of the arterial blood gas study evidence.

C. Medical Opinion Evidence

The case file also contains various hospital records (DX 77; DX 121-19); the medical opinions of Drs. Bloom (DX 47), Hanzel (DX 16), Fino (DX 33), Pickerill (DX 36; Solar EX 4), and Srivastava (DX 54), which were issued prior to the miner's death; the death certificate (DX 103; DX 121-4; CX-B), and, the reports and/or depositions of Drs. Rizkalla (DX 121-5; CX-C), Desai (DX 107), Hansbarger (Conesville EX 3), Srivastava (DX 110; DX 121-19), Perper (DX 121-6), Fino (Conesville EX 2), Oesterling (DX 121-19; Solar EX 2), Naeye (DX 121-20), Tomashefski (DX 121-21), Crouch (DX 121-25), and Pickerill (Solar EX 1), which were rendered after the miner's death.

The case file reveals that Mr. Lambert was hospitalized on several occasions during the last two years of his life for severe chronic obstructive pulmonary disease and acute exacerbation thereof. (DX 77; DX 121-19). Since the foregoing records do not specify that Mr. Lambert's respiratory or pulmonary impairment was caused by coal mine employment, such records are insufficient to establish "causation" under the Act and applicable regulations.

Dr. Marvin A. Bloom examined Mr. Lambert in 1984. (DX 47). As outlined above, various clinical tests were apparently conducted, in conjunction with Dr. Bloom's examination on January 23, 1984. (DX 47). In his report, dated March 10, 1984, Dr. Bloom set forth Claimant's history, subjective complaints, and physical findings on examination. With no explanation, Dr. Bloom diagnosed chronic obstructive lung disease, and checked the "No" box of the form report, indicating that the diagnosed condition is not related to dust exposure in Mr. Lambert's coal mine employment. (DX 47). In view of the progressive nature of pneumoconiosis, the more recent medical opinion evidence is generally considered to be more probative. Moreover, in the present case, I do not find Dr. Bloom's report to be well-reasoned. Therefore, I accord it no weight.

Dr. George D. Hanzel examined the Claimant on December 4, 1995. (DX 16). Dr. Hanzel set forth the miner's history, subjective complaints, and physical findings. Furthermore, Dr. Hanzel summarized the results obtained on chest x-ray, pulmonary function study, arterial blood gas, and EKG. The chest x-ray was interpreted as showing "Emphysema. No

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[6] Conesville's Closing Argument, page 3, lists some arterial blood gas tests as "NQ" (*i.e.*, nonqualifying) which are, in fact, qualifying, based upon the PCO2 values above 50. 20 C.F.R. Part 718, Appendix C. However, as outlined above, the preponderance of such evidence is nonqualifying.

Coalworker's Pneumoconiosis." Dr. Hanzel found a "severe obstructive defect" on the pulmonary function study. The arterial blood gases were reported as showing "Normal oxygenation on room air at rest with a significant increase at rest" (sic). In addition, the EKG was interpreted as "normal." Based upon the foregoing, Dr. Hanzel listed the following cardiopulmonary diagnoses: "1. No Coalworker's Pneumoconiosis. 2. Pulmonary Emphysema." Dr. Hanzel attributed the miner's pulmonary emphysema to "cigarette smoking and possible Alpha-1 antitrypsin deficiency. In addition, Dr. Hanzel described the Claimant's overall respiratory impairment as "mild to moderate," and concluded that it would not prevent him from performing the work of a stationary equipment operator. (DX 16). Although Dr. Hanzel's opinion is fairly well-reasoned, it is somewhat undermined by his failure to diagnose pneumoconiosis. Furthermore, there appear to be an inconsistency between his finding of a "severe obstructive defect" on pulmonary function study, and his finding of only a "mild to moderate respiratory impairment." Therefore, I accord Dr. Hanzel's report little weight.

Dr. Gregory J. Fino, a B-reader who is Board-certified in Internal Medicine and Pulmonary Disease, examined Mr. Lambert on August 8, 1996 and administered various clinical tests, as set forth above. Furthermore, in his report, dated August 20, 1996 (DX 33), Dr. Fino not only discussed his own findings, but also reviewed and summarized the other available medical data. Based upon his thorough analysis, Dr. Fino concluded:

1. There is insufficient objective medical evidence to justify a diagnosis of simple coal workers' pneumoconiosis.

2. It is my opinion that this man does not suffer from an occupationally acquired pulmonary condition.

3. There is a disabling respiratory impairment present due to cigarette smoking.

4. From a respiratory standpoint, this man is totally disabled from returning to his last mining job or a job requiring similar effort.

(DX 33).

Based upon the medical evidence which was available, I find that the foregoing report is well-reasoned and documented. Furthermore, as discussed below, Dr. Fino later reviewed additional evidence, and subsequently concluded that there is sufficient evidence to establish simple pneumoconiosis. However, Dr. Fino reiterated that the miner's respiratory disability (and death) were not caused thereby (*See* Conesville EX 2).

Dr. Robert G. Pickerill, a B-reader who is Board-certified in Internal Medicine and Pulmonary Disease, examined Mr. Lambert on May 28, 1997 and administered various clinical tests, as set forth above (DX 36; Solar EX 4). In his report on that date, Dr. Pickerill discussed his own findings and reviewed other available medical data. Based upon his analysis, Dr. Pickerill

concluded:

> It is my opinion with a reasonable degree of medical certainty that Mr. Russell J. Lambert has a severe functional respiratory impairment due to non-occupational COPD and pulmonary emphysema which would prevent him from doing his last job in the coal mining industry.
>
> However, it is also my opinion with a reasonable degree of medical certainty that there is no evidence of coal workers' pneumoconiosis or disabling occupational lung disease.
>
> In conclusion, it is my opinion with a reasonable degree of medical certainty that Mr. Russell J. Lambert has severe pulmonary emphysema which I would attribute to previous tobacco smoking, but no evidence of coal workers' pneumoconiosis.

(DX 36; Solar EX 4).

I find that the foregoing report is well-reasoned and documented, based upon the medical evidence which was, then, available to Dr. Pickerill. As set forth below, Dr. Pickerill later considered additional evidence, and subsequently concluded that there is sufficient evidence to establish simple pneumoconiosis. However, as discussed below, Dr. Pickerill found that pneumoconiosis was not a substantial contributing factor in the miner's respiratory disability and/or his death (*See* Solar EX 1).

Dr. Sheo N. P. Srivastava examined Mr. Lambert on June 24, 1997. In his report, dated June 25, 1997 (DX 54), Dr. Srivastava set forth the miner's history, subjective complaints, physical findings, a positive chest x-ray reading, and abnormal pulmonary function studies. Based upon the foregoing, Dr. Srivastava concluded:

> IMPRESSION: 1) Coalworkers Pneumoconiosis
>
> The patient who has worked in the mines for such a long period of time and who has inhaled coal dust (sic). His job was inside the mines where there was a lot of dust. As a result of that he developed Coalworkers Pneumoconiosis.
>
> As a result of the Coalworkers Pneumoconiosis he is totally and permanently disabled for any gainful employment.

(DX 54).

On its face, the foregoing opinion appears to be reasoned and documented. However, Dr. Srivastava grossly understated Mr. Lambert's smoking history as follows:

> He occasionally smokes. The total he smokes was about twenty years and he smoked initially ten to twelve cigarettes per day but later, he cut down to three or four cigarettes. For the last ten years he has not smoked at all.

(DX 54).

The foregoing smoking history includes an apparent inconsistency between the statement that Mr. Lambert "occasionally smokes"....(and)...the last ten years he has not smoked at all." Moreover, as discussed above, Mr. Lambert's actual cigarette smoking history was far more extensive than reported by Dr. Srivastava. This undermines the credibility of the opinion, because it is unclear whether Dr. Srivastava would have reached the same conclusion regarding the etiology of Mr. Lambert's disability had he been aware of Mr. Lambert's actual smoking history. In view of the foregoing, I accord Dr. Srivastava's report less weight. As outlined below, Dr. Srivastava subsequently testified at deposition (*See* DX 110; DX 121-19).

The miner's death certificate, which was signed by Wallace E. Miller, Coroner, states that the Mr. Lambert died on June 24, 1999, at age 66, of carcinoma of the lung. (DX 103; DX 121-4; CX-B). In addition, coal worker's pneumoconiosis was listed under the heading: "Other significant conditions contributing to death, but not resulting in the underlying cause given in PART I" (*i.e.*, "Carcinoma of the Lung"). Although the death certificate indicates that an autopsy was performed and the autopsy findings were available prior to the completion of the cause of death provisions of the death certificate, there is no indication that the Coroner had any independent knowledge of the miner's condition prior to death. Furthermore, the Coroner provided no analysis regarding the underlying basis for his conclusions regarding the cause of death. Therefore, I accord the death certificate little weight.

The autopsy protocol was issued by the prosector, Dr. Waheeb Rizkalla, an Associate in Pathology. (DX 121-5; CX-C). The autopsy protocol sets forth a gross description and microscopic description, as well as the following final anatomic diagnoses:

> Anaplastic Small Cell Carcinoma, Right Lung
>
> Acute Bronchopneumonia
>
> Scar Emphysema
>
> Simple Coal Workers' Pneumoconiosis
>
> Atherosclerotic Coronary Heart Disease, Mild
>
> Cor Pulmonale

(DX 121-5; CX-C).

In addition, the autopsy protocol included the following clinical summary:

> This 65-year-old, white male was a coal miner for 29 ½ years none of which were underground. He smoked about 1 ½ cigarettes per day for 25 years. He had not been smoking cigarettes for 15 years prior to his death.

(DX 121-5; CX-C).

Finally, the autopsy protocol included the following clinicopathological summary:

> The autopsy of this 65-year-old white man revealed simple coal worker's pneumoconiosis with cor pulmonale. The immediate cause of death is anaplastic small cell carcinoma complicated with terminal acute bronchopneumonia. The manner of death is natural.

(DX 121-5; CX-C).

If Dr. Rizkalla's entry of "1 ½ cigarettes per day for 25 years" was a typographical error, and, he intended to report 1 ½ packs of cigarettes per day, then, one can surmise that Dr. Rizkalla had some knowledge of the miner's extensive cigarette smoking history, and the autopsy protocol would be deemed reasoned and documented. Although Dr. Rizkalla listed simple coal worker's pneumoconiosis, as well as cor pulmonale, among various diagnosed conditions, he attributed the immediate cause of the miner's death to "anaplastic small cell carcinoma complicated with terminal acute bronchopneumonia." Furthermore, Dr. Rizkalla did not provide an opinion regarding the miner's respiratory or pulmonary condition prior to death; nor did he address the question of whether pneumoconiosis played a role in the miner's disability or death.

Dr. Jayesh Desai, the miner's treating pulmonologist, issued a somewhat cursory report, dated July 27, 2000. (DX 103). After citing various negative chest x-ray interpretations, Dr. Desai stated, in pertinent part:

> ...I do not have credentials to do coal worker's pneumoconiosis evaluations and I am not approved by the Federal government to do black lung evaluations...With my background of being a pulmonologist who was formally trained to do pulmonary medicine with fellowship my qualifications are a pulmonary physician (sic). As far as my knowledge and the x-ray findings that I have he did not have classic pneumoconiosis findings. I was not treating him for pneumoconiosis, but for chronic obstructive lung disease and emphysema, which were severe in nature, and his disability was related to that condition.
>
> ...Mr. Lambert had significant other problems which would be bullous emphysema, severe chronic obstructive lung disease impairing his health. From the pulmonary standpoint I do not see classic findings of pneumoconiosis on Mr. Lambert.

(DX 103).

Although Dr. Desai was the miner's treating physician, I find his report to be neither well-reasoned nor well-documented. Dr. Desai acknowledges he lack of expertise in black lung evaluations. He cites no clinical evidence other than x-ray readings. Furthermore, Dr. Desai's report does not address the issues of whether the miner suffered from "legal" pneumoconiosis as defined in the Act and regulations; and/or whether the disease, if found, played a role in the miner's disability or death. Therefore, I accord Dr. Desai's opinion little weight.

Dr. Echols A. Hansbarger, Jr., is Board-certified in Anatomic and Clinical Pathology and is also a Board-certified Forensic Examiner. In conjunction with a report, dated October 15, 2000, Dr. Hansbarger provided a microscopic description and listed various diagnoses (Conesville EX 3). Based upon his review of the available medical records, including the autopsy protocol, the autopsy slides, death certificate, hospital records, and various other medical documents, Dr. Hansbarger set forth the following conclusions:

1. Mr. Lambert died as a result of undifferentiated small cell carcinoma of the lung with acute bronchopneumonia and severe bullous centrilobular emphysema of the lung with honeycomb formation;

2. Mr. Lambert shows, in addition, the findings of pulmonary anthracosilicosis of a degree sufficient to warrant the diagnosis of coal workers' pneumoconiosis of the dust reticulation type. This is simple coal workers' pneumoconiosis and no evidence of complicated coal workers' pneumoconiosis or progressive massive fibrosis is seen.

3. I do not believe the mild coal workers' pneumoconiosis that Mr. Lambert shows the findings of contributed to his demise either on a primary or secondary basis. Further, I believe there was no respiratory impairment or pulmonary disability present in Mr. Lambert because of the coal workers' pneumoconiosis. This statement is made because of the mild nature of the condition. Further, I believe that his death was not hastened in any way, shape or form by the coal workers' pneumoconiosis. This statement, again, is made because of the mild nature of the condition;

4. The undifferentiated small cell carcinoma of the lung and the severe bullous centrilobular emphysema of the lung which are noted in the lungs of Mr. Lambert are as a direct result of a long pack year history of cigarette smoking and are not related to the coal workers' pneumoconiosis in any way, shape or form.

(Conesville EX 3).

Dr. Sheonath P. Srivastava testified at deposition on November 7, 2000. (DX 110; DX 121-19). Notwithstanding contrary opinions by various physicians, including the miner's treating physician and better-credentialed pulmonary specialists, Dr. Srivastava reiterated that, in his opinion, Mr. Lambert suffered from pneumoconiosis, which, in turn, caused his respiratory and pulmonary problems. However, Dr. Srivastava's opinion is undermined by his lack of pulmonary expertise. He acknowledged that he is only Board-eligible in Internal Medicine, since he failed the

certification examination on one or two occasions. Accordingly, Dr. Srivastava is also not even Board-eligible in Pulmonary Disease. (DX 110; DX 121-19, pp. 8-9). Furthermore, Dr. Srivastava was under the misconception that Mr. Lambert's 28 years of coal mine employment were spent in underground mines. Moreover, as discussed above, Dr. Srivastava grossly understated the miner's actual smoking history. (DX 110; DX 121-19, pp. 16-17).

Dr. Joshua A. Perper, who is Board-certified in Anatomical and Forensic Pathology and also has a law degree, issued a lengthy report, dated November 10, 2000 (DX 121-6), in which he summarized various reported smoking and occupational histories, as well as the available medical evidence. Furthermore, Dr. Perper provided his own findings on microscopic examination of the autopsy tissue, and answered various questions. In addition, Dr. Perper included some references to medical literature, including appendices which discussed "Coal workers' pneumoconiosis and associated centri-lobular emphysema" and "Coal workers' pneumoconiosis and lung cancer." In summary, Dr. Perper concluded:

1. Mr. Lambert had evidence of mild simple coal workers' pneumoconiosis with associated severe silicotic centrilobular emphysema and it is probable that the pulmonary cancer is also a combined result of exposure to coal mine dust containing silica and smoking.

2. Mr. Lambert, a coal miner with an occupational exposure of more than twenty-eight (28) years developed coal workers' pneumoconiosis as a result of occupational exposure to coal mine dust.

3. Coal workers' pneumoconiosis with associated centrilobular emphysema, was a substantial contributory cause of Mr. Lambert's death, both directly and through hypoxemia and complicating bronchopneumonia, and through the complicating carcinoma of the lung.

(121-6).

On its face, Dr. Perper's report is well reasoned and documented. It clearly supports a finding of pneumoconiosis arising from coal mine employment. However, as discussed below, Dr. Perper's finding that the miner's "mild simple coal workers' pneumoconiosis" played a significant role in the miner's disability and/or death is contrary to the overwhelming weight of the evidence, as provided by several other well-credentialed pathologists and virtually all the Board-certified pulmonary specialists of record.

Dr. Fino issued a lengthy supplemental report, dated November 13, 2000, in which he referred to the prior findings he made upon examination of Mr. Lambert in 1996, while also reviewing the additional available medical evidence. In addition, Dr. Fino analyzed the evidence in conjunction with relevant medical literature (Conesville EX 2). At the end of his well-reasoned and documented report, Dr. Fino set forth the following conclusions:

1. Simple coal workers' pneumoconiosis was present.

2. There is no evidence that pneumoconiosis caused, contributed to, or participated in

this man's respiratory disability which was due to both smoking induced obstructive lung disease with emphysema and lung cancer.

3. This man died as a result of lung cancer. Pneumoconiosis did not cause, contribute to, or hasten this man's death.

4. This man would have died a and when he did had he never stepped foot in the mines.

(Conesville EX 2).

Dr. Everett F. Oesterling, Jr., who is Board-certified in Anatomical Pathology, Clinical Pathology, and Nuclear Medicine, issued a report, dated March 16, 2001, in which he analyzed the histological slides while utilizing photomicrophages and also referred to the miner's extensive medical records. (DX 121-19). Dr. Oesterling discussed the autopsy slides, in detail, and cited some medical reports indicating a significant cigarette smoking history. Based upon the foregoing, Dr. Oesterling stated, in pertinent part:

> Smoking is a process which is known to produce centrilobular emphysema progressing to bolus emphysema and is also a known factor in the evolution of small cell carcinomas of the lung. These are the primary disease processes which impacted his lifetime function and resulted in his death. They must be attributed to his smoking history.

(DX 121-19). In addition, Dr. Oesterling criticized Dr. Perper's opinion, stating, in pertinent part:

> In his report Joshua A. Perper, M.D. attempts to incriminate silica exposure for the evolution of this gentleman's terminal disease process. He refers to current literature as predominantly substantiating that there is increased incidence of carcinoma in workers exposed to silica. There is much discussion in the literature concerning this factor, and specifically as it relates to coalminers, many studies accurately refute this claim. Moreover, it must be understood that in any event the evolution of malignancy is closely related to the dose of the causative agents. This gentleman exhibits minimal nodular change in his lung tissue and polarized light reveals sparse numbers of silica crystals in the black pigment which is present. Thus this gentleman had a relatively low silica burden, and based on this alone, silica exposure cannot be considered a factor in the evolution of this gentleman's tumor. Again, cigarette smoke exposure must be considered the agent which resulted in this gentleman's lifetime disease and his terminal illness.

(DX 121-19).

At deposition on October 11, 2001 (Solar EX 2), Dr. Oesterling reiterated the foregoing opinion. In summary, Dr. Oesterling stated that Mr. Lambert's coal worker's pneumoconiosis and/or occupational dust exposure did not cause any lifetime pulmonary dysfunction, nor did it cause, contribute to, or hasten the miner's death. To the contrary, Mr. Lambert suffered from

two primary disease process which affected his lungs; namely a tumor and emphysema, which were totally unrelated his mine dust exposure (Solar EX 2, pp. 24-28).

Dr. Richard L. Naeye, who is Board-certified in Anatomic and Clinical Pathology, issued a report, dated April 2, 2001. (DX 121-20). Dr. Naeye cited various medical evidence and described the findings on autopsy. Furthermore, Dr. Naeye referenced numerous medical publications. In summary, Dr. Naeye stated:

> INTERPRETATIONS: Moderately severe anthracosis is present. Because it is not possible to be certain whether fibrous tissue and focal emphysema are associated with the pigment, it is difficult to be sure if very mild, simple pneumoconiosis (CWP) is present or absent. In this situation, I give the benefit of the doubt to the miner and say that simple CWP is present. However, if present it is far too mild to have caused any abnormalities in lung function, any disability or hastened death. The cause of death was a combination of the aforementioned carcinoma, very severe centrilobular emphysema and a terminal acute lobular pneumonia. Long term exposure to dust in bituminous coal mines had no role or only a very small role in the genesis of centrilobular emphysema. Many yeas of cigarette smoking was the cause of the centrilobular emphysema in this case. There is plentiful evidence that exposure to coal mine dust does not predispose to the development of lung cancer. Finally, studies of randomly selected populations of coal miners have shown no effect of mine dust exposure on life expectancy. Such expectancy would surely have been reduced if exposure to coal mine dust had caused lung cancer, clinically significant centrilobular emphysema or chronic bronchitis. In this latter regard there is no doubt that coal mine dust exposure as well as smoking cigarettes can lead to chronic bronchitis, and less often to chronic bronchiolitis. Studies by Fletcher et al, Bates et al, and Foxman et al indicate that such bronchitis has little or no effect on lung function unless the subject happens to be a cigarette smoker. Airway obstruction caused by centrilobular emphysema and bronchitis that is severe enough to preclude a miner from working is very rare if indeed it occurs at all in the absence of smoking or complicated CWP.

(DX 121-20)(Footnotes citing medical literature omitted).

Dr. Joseph F. Thomashefski, Jr., who is Board-certified in Anatomic and Clinical Pathology, issued a report, dated May 10, 2001 (DX 121-21). Dr. Thomashefski cited the available medical evidence and set forth his own findings on examination of the autopsy slides. Although Dr Thomashefski agreed with Dr. Perper's finding of mild simple coal worker's pneumoconiosis, he expressed strong disagreement with Dr. Perper's conclusions regarding the role of pneumoconiosis in the miner's disability and death. In summary, Dr. Thomashefski stated, in pertinent part:

> Dr. Perper also concludes that "coalworkers' pneumoconiosis with associated centrilobular emphysema was a substantial contributory cause of Mr. Lambert's disability, both directly and through hypoxemia and complicating bronchopneumonia, and through complicating carcinoma of the lung." I strongly disagree with this conclusion. In the first place, Mr. Lambert's simple

coalworkers' pneumoconiosis is of too mild a degree to have been the cause of pulmonary disability. Furthermore, Mr. Lambert's mild simple coalworkers' pneumoconiosis, which affects a minimal component of his lung tissue, cannot be construed as a cause of panacinar emphysema which was severe throughout Mr. Lambert's entire lung. In my opinion, Mr. Lambert's severe panacinar emphysema was entirely caused by his exposure to cigarette smoke. As I have previously alluded to, Mr. Lambert's small cell lung cancer was also caused by cigarette smoke and was not related to coal dust exposure or simple coalworkers' pneumoconiosis.

In my opinion, within reasonable medical certainty, Mr. Lambert's death and respiratory disability were totally unrelated to his coal mining activities. He would have died in the same manner and at approximately the same time, even if he had never been involved in coal mining or had never developed mild simple coalworkers' pneumoconiosis.

(DX 121-21).

Dr. Erika C. Crouch, a Professor of Pathology and Immunology, issued a pulmonary pathology consultation report, dated August 15, 2001 (DX 121-25). Dr. Crouch listed various medical data which she had reviewed. Furthermore, Dr. Crouch set forth her own microscopic findings on examination of the autopsy slides. Based upon the foregoing, Dr. Crouch stated:

Diagnosis

Lungs, autopsy	-:	small cell undifferentiated carcinoma
	-:	emphysema
	-:	simple coal workers' pneumoconiosis, mild

Comment:

The sections show mild simple coal workers' pneumoconiosis characterized by small numbers of small coal dust macules. No larger lesions are observed and there is no evidence of silicosis. There is no concordance between the severity of or extent of the coal dust deposition and the severity or extent of the observed emphysema. In addition, the mixed patterns of emphysema with panacinar and distal acinar changes indicate cigarette smoking is the underlying etiology. Thus, occupational coal dust exposure could not have caused any clinically significant degree of functional impairment or disability and could not have caused, contributed to, or otherwise hastened this patient's death from small cell carcinoma of the lung. The major risk factor for this patient's lung cancer is cigarette smoking. Although some investigators have concluded that silicosis is associated with an increased risk of lung cancer, this remains controversial. In any case, only small amounts of silicates are observed and there is no evidence of silicosis.

Crouch (DX 121-25).

Dr. Robert G. Pickerill, who had previously examined the miner on May 28, 1997 and issued a report on that date (DX 36; Solar EX 4), subsequently testified at deposition on April 4, 2002 (Solar EX 1). After considering the additional medical data, Dr. Pickerill acknowledged the autopsy finding of pneumoconiosis, as well as carcinoma of the lung. Dr. Pickerill noted that, at the time of his examination of the miner, he had found no radiographic evidence of pneumoconiosis, but he did find severe chronic obstructive pulmonary disease and pulmonary emphysema, which he attributed to tobacco smoking (Solar EX 1, pp. 22-23). In light of the autopsy finding of pneumoconiosis, Dr. Pickerill acknowledged that coal dust played a "minor contribution" or a "minimal contribution" in Mr Lambert's lifetime disability, but concluded it was not a substantial contributing factor therein.

Furthermore, when asked whether the miner's pneumoconiosis, as identified on autopsy, played any role in Mr. Lambert's death, Dr. Pickerill stated:

> No, it's very doubtful that it would have had any relationship to his death or hastened his death. His death was directly due to the advanced bronchogenic small cell carcinoma and complicated by terminal pneumonia.

(Solar EX 1, p. 30).

Similarly, when asked whether coal mine dust exposure or any other occupationally-related exposure substantially contributed to Mr. Lambert's death, Dr. Pickerill stated: "No, in my opinion, the coal dust exposure wold not have contributed to his death." (Solar EX 1, pp. 30-31). Finally, in response to questioning regarding whether pneumoconiosis or occupational exposure hastened Mr. Lambert's death, Dr. Pickerill stated:

> It's very doubtful it would have hastened his death. His death was directly related to the advanced carcinoma which wold have occurred irregardless (sic) of what type of lung function he had to start with.

(Solar EX 1, p. 31).

Discussion and Applicable Law

As set forth above, the Employers have stipulated, and I find, that Mr. Lambert had simple pneumoconiosis. Furthermore, the evidence does not rebut the presumption that the disease arose from the miner's more than ten years of coal mine employment. *See* 20 C.F.R. §718.203 and §718.302. However, in order to establish entitlement in the miner's claim, Claimant must also establish that the miner was totally disabled and that such disability was due to pneumoconiosis. Furthermore, in order to be eligible for benefits in the survivor's claim, Claimant must establish that the miner's death was due to pneumoconiosis, as provided in the Act and applicable regulations.

Total Disability

The regulations provide that a claimant can establish total disability by showing the miner has a pulmonary or respiratory impairment which, standing alone, prevents the miner from performing his or her usual coal mine work, and from engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time. *See* 20 C.F.R. §718.204(b)(1)(2001). Where, as here, complicated pneumoconiosis is not established, total disability may still be established by pulmonary function tests, by arterial blood gas tests, by evidence of cor pulmonale with right sided congestive heat failure, or by physicians' reasoned medical opinions, based upon medically acceptable clinical and laboratory diagnostic techniques, that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in his usual coal mine work or comparable employment. *See* 20 C.F.R. §718.204(b)(2)(i)-(iv)(2001).

As outlined above, the earliest pulmonary function study, dated January 23, 1984, was nonqualifying. However, all the subsequent pulmonary function tests from December 4, 1995 through December 31, 1998 were qualifying. Therefore, Claimant has established total disability pursuant to §718.204(b)(2)(i) (2001). On the other hand, the preponderance of the arterial blood gas evidence is not qualifying. Accordingly, total disability has not been established under §718.204(b)(2)(ii)(2001).

Although cor pulmonale was noted on the autopsy protocol (DX 121-5; CX-C), no other pathologist found it had the evidence does not establish cor pulmonale with right-sided congestive heart failure, as required under §718.204(b)(2)(iii)(2001). Accordingly, Claimant has not established total disability under this subsection.

Finally, as outlined above, the early opinions of Drs. Bloom (DX 47) and Hanzel (DX 16) were either silent regarding the total disability issue, or specifically stated that Mr. Lambert was not totally disabled from a respiratory or pulmonary standpoint. However, as discussed above, their opinions were neither well-reasoned nor well-documented. Furthermore, their opinions are less probative, in view of the progressive nature of pneumoconiosis. In addition, they are not Board-certified pulmonologists. On the other hand, the more recent medical opinions of various physicians, including Board-certified pulmonary specialists, such as Drs. Fino (DX 33; Conesville EX 2) and Pickerill (DX 36; Solar EX 4; Solar EX 1), clearly establish that Mr. Lambert suffered from a totally disabling respiratory or pulmonary impairment. Therefore, Claimant has established total disability under §718.204(b)(2)(iv)(2001).

Having found total disability on the basis of the pulmonary function studies and the medical opinion evidence, I must weigh all of the contrary and probative evidence together to determine if Claimant has established total disability under Section 718.204(b) overall. *See Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986).

Based upon my thorough review of the entire record, I find that the early medical evidence failed to establish total disability, and the preponderance of the arterial blood gas evidence is nonqualifying. Nevertheless, the more recent pulmonary function evidence, which

also measures the miner's respiratory or pulmonary condition, is qualifying, and the consensus among the more recent medical opinions, including Board-certified pulmonary specialists, is that the Claimant is precluded from performing his last usual coal mine job due to his respiratory or pulmonary impairment. Therefore, taken as a whole, I find that total disability has been established under amended §718.204(b).

Causation

Although Clamant has established that Mr. Lambert had pneumoconiosis arising from his coal mine work, and, that he was totally disabled by a respiratory or pulmonary impairment, in order to be eligible for benefits in the miner's claim, Claimant still has the burden of establishing that the disability was due to pneumoconiosis.

Under the provisions of §718.204(c)(1), a "miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment." Furthermore, the regulations state, in pertinent part:

> ...Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i),(ii).

As set forth above, the record contains hospital records (DX 77; DX 121-19), the miner's death certificate (DX 103; DX 121-4; CX-B), and, the medical opinions of Drs. Bloom (DX 47), Hanzel (DX 16), Fino (DX 33; Conesville EX 2), Pickerill (DX 36; Solar EX 1,4), Srivastava (DX 54; DX 110; DX 121-19)), Rizkalla (DX 121-5; CX-C), Desai (DX 107), Hansbarger (Conesville EX 3), Perper (DX 121-6), Oesterling (DX 121-19; Solar EX 2), Naeye (DX 121-20), Tomashefski (DX 121-21), and Crouch (DX 121-25).

The hospital records do not specify the etiology of Mr. Lambert's chronic obstructive pulmonary disease. Therefore, such records neither preclude nor establish "causation" under the Act. The death certificate lists coal worker's pneumoconiosis, but it not well-reasoned. Furthermore, it does not directly address the issue of pneumoconiosis as a substantial cause of the miner's total disability. Dr. Bloom noted that Mr. Lambert's chronic obstructive lung disease is not related to coal mine employment. However, his report is poorly reasoned. Dr. Hanzel attributed Mr. Lambert's pulmonary emphysema to cigarette smoking and possible Alpha-1antitrypsin deficiency. His opinion is somewhat undermined by his failure to diagnose pneumoconiosis. Moreover, for the reasons outlined above, I also accord little weight to Dr. Desai's report. Furthermore, Dr. Rizkalla's autopsy protocol does not directly address the cause of the miner's total disability.

Accordingly, the crux of this case rests on the relative weight to be accorded to the

opinions of Drs. Fino, Pickerill, Srivastava, Hansbarger, Perper, Oesterling, Naeye, Tomashefski, and Crouch.

Of the foregoing, only Drs. Srivastava and Perper opined that pneumoconiosis was a substantially contributing cause of Mr. Lambert's totally disabling respiratory or pulmonary impairment. However, as set forth above, Dr. Srivastava's credentials in pulmonary medicine are minimal. Moreover, he grossly understated the miner's cigarette smoking history. Therefore, I accord Dr. Srivastava's opinion little weight. Dr. Perper is a well-credentialed pathologist, whose report appears, on its face, to be reasoned and documented. However, in making a determination regarding the cause of Mr. Lambert's totally disabling respiratory or pulmonary impairment, I find that expertise in pulmonary medicine is more significant. In the present case, Drs. Fino and Pickerill, who are Board-certified in Internal Medicine and Pulmonary Disease, opined that pneumoconiosis either played no role whatsoever (Fino), or a "minor" or "minimal" contribution Pickerill) to Mr. Lambert's lifetime disability. In addition, I note that even Dr. Perper described the miner's simple coal worker's pneumoconiosis as only "mild." Furthermore, Dr. Perper's opinion is not only contrary to the well-reasoned medical opinions of two pulmonary specialists, but also, it is also contrary to the findings of other, well-credentialed pathologists, such as Drs. Hansbarger, Oesterling, Naeye, Tomashefski, and Crouch, who opined that the extent of the miner's simple pneumoconiosis was too limited to have caused or substantially contributed to the miner's total disability and/or to have caused, substantially contributed, or hastened the miner's death.

Having carefully weighed all of the medical opinion evidence, I find that the opinions of Drs. Fino, Pickerill, Hansbarger, Oesterling, Naeye, Tomashefski, and Crouch far outweigh the contrary conclusions of Drs. Srivastava and Perper. Accordingly, Claimant has failed to establish that pneumoconiosis is a "substantially contributing cause" of his total respiratory disability, as defined in 20 C.F.R. §718.204(c)(1).

Death due to Pneumoconiosis

Since the claim was filed after January 1, 1982, the issue of death due to pneumoconiosis is governed by §718.205(c), as amended, which states, in pertinent part:

> For the purpose of adjudicating survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if any of the following criteria is met:
>
> (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
>
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
>
> (3) Where the presumption set forth at §718.304 is applicable.
>
> (4) However, survivors are not eligible for benefits where the miner's death was

> caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
>
> (5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. §718.205(c).

As outlined above, the death certificate states that the miner died of lung cancer, but also lists coal worker's pneumoconiosis as a significant condition contributing to death, albeit not to the immediate cause. However, the coroner, who signed the death certificate did not indicate that he had any knowledge of the miner's condition prior to death. Furthermore, he did not provide any basis for his conclusion. Therefore, I accord the death certificate little weight. The autopsy protocol, signed by Dr. Rizkalla, is better documented. It clearly states that the immediate cause of Mr. Lambert's death was small cell carcinoma complicated by terminal acute bronchopneumonia. Although it mentions pneumoconiosis among other conditions, it does not address the issue of whether pneumoconiosis contributed or hastened the miner's death.

Of the physicians who addressed the "death due to pneumoconiosis," in particular, those who are pulmonary specialists (Drs. Fino, Pickerill) or pathologists (Drs. Perper, Hansbarger, Oesterling, Naeye, Tomashefski, and Crouch), only Dr. Perper opined that pneumoconiosis was a substantially contributing factor and/or hastened the miner's death. In view of Dr. Perper's own finding of only "mild" pneumoconiosis; Mr. Lambert's extensive cigarette smoking history; and, the overwhelming preponderance of the medical opinion evidence to the contrary, I accord greater weight to the well-reasoned and documented medical opinions of Drs. Fino, Pickerill, Hansbarger, Oesterling, Naeye, Tomashefski, and Crouch. In view of the foregoing, I find that the Claimant has failed to establish death due to pneumoconiosis under §718.205(c), or by any other means.

Conclusion

Although the Claimant has established that the miner had simple pneumoconiosis and suffered from a totally disabling respiratory or pulmonary impairment, the evidence does not establish that the miner was totally disabled due to pneumoconiosis. Furthermore, the evidence does not establish that pneumoconiosis caused, substantially contributed to, or hastened the miner's death. Accordingly, I find that the Claimant is not entitled to benefits under the Act and applicable regulations.

ORDER

The claims of Russell J. Lambert and Marlene W. Lambert, his surviving spouse, for black lung benefits under the Act are hereby **DENIED**.

A

RICHARD A. MORGAN
Administrative Law Judge

RAM:MP:dmr

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. 725.481, any party dissatisfied with this Order may appeal to the Benefits Review Board within 30 days from the date of this Decision and Order, by filing a notice of appeal with the ***Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601.*** A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.